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Supreme Court of the United States

OCTOBER TERM, 1970

No. 1026

SANDRA FENTON *ET AL.*,
Appellants,

v.

BOSTON SCHOOL COMMITTEE,
Appellee.

APPELLEE'S MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

PETER L. KOFF,
Assistant Corporation Counsel
City of Boston Law Department
1 City Hall Square
Boston, Massachusetts 02201
(Tel. 617-722-4100)
Attorney for Appellee.

Of Counsel:
HERBERT P. GLEASON,
Corporation Counsel
of the City of Boston.

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APPELLEE'S MOTION TO DISMISS OR AFFIRM

Now comes the Boston School Committee and respectfully moves, pursuant to Rule 16 of the Rules of this Court, that this Honorable Court dismiss the appeal herein, or, in the alternative, affirm the judgment of the Supreme Judicial Court of Massachusetts.

PETER L. KOFF,
Assistant Corporation Counsel
City of Boston Law Department
1 City Hall Square
Boston, Massachusetts 02201
(Tel. 617-722-4100)
Attorney for the
Boston School Committee.

BRIEF IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

Statement With Respect to Jurisdiction

In their Jurisdictional Statement (Jur. St. 2),[1] appellants contend that jurisdiction of this Court to review the decision of the Supreme Judicial Court of Massachusetts in this case is conferred by 28 U. S. C. s. 1257 (2) which gives this Court jurisdiction by appeal under the following circumstances:

> "[W]here is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellants state that the following three questions are presented by way of appeal under s. 1257 (2):

> "1. Whether appellants, as non-tenured public school teachers, were constitutionally entitled to procedural due process prior to their suspension and dismissal. [Hereinafter referred to as 'the due process issue']
>
> 2. Whether there is a substantial likelihood that appellants' dismissal was based upon activities which are protected by the First Amendment. [Hereinafter referred to as 'the First Amendment issue']
>
> 3. Whether a statutory scheme which grants procedural rights to tenured teachers but withholds them from non-tenured teachers violates the equal protection clause. [Hereinafter referred to as 'the equal protection issue']" (Jur. St. 6)

Assuming that this Court does not concur with the appellee that the decision below rests on an adequate non-federal basis, appellee submits that the due process and First Amendment issues are not properly presented to this Court by appeal under s. 1257 (2). The Supreme Judicial Court of Massachusetts determined that Mass. G. L., c. 71, ss. 42 and 42D (as

[1] "Jur. St." refers to the Jurisdictional Statement and "Jur. St. App." refers to the Appendix in the Jurisdictional Statement.

then existing)[2] do not apply to non-tenured teachers such as appellants. (Jur. St. App. 5a-7a.) Accordingly, since appellants are non-tenured teachers, they cannot (and, in fact, do not) contend that these sections deprive tenured teachers of due process and invalidly infringe upon First Amendment rights. Appellants, as non-tenured teachers, have no standing to complain about the due process and First Amendment implications of these sections. Appellants' due process and First Amendment contentions are not based upon any alleged invalidity in Mass. G. L., c. 71, ss. 42 and 42D, but rather are based upon their belief that the *actual method* of their suspension and dismissal violated due process and infringed their rights under the First Amendment. Such contentions are not appealable but may be reviewed only by writ of certiorari.[3]

The only appealable issue presented by appellants is their contention that Mass. G. L., c. 71, ss. 42 and 42D, deny equal protection to non-tenured teachers. However, since this Court may treat appellants' Jurisdictional Statement as a petition for a writ of certiorari under 28 U. S. C. s. 2103, appellee will discuss the due process and First Amendment issues as if they had been presented in such a petition.

I.

The judgment of the Supreme Judicial Court of Massachusetts rests on an adequate non-federal basis.

Appellee submits that the present appeal should be dismissed because the judgment of the Supreme Judicial Court

[2] See footnote 5, *infra*.

[3] This distinction is recognized in the Motion for Leave to File and Memorandum of the National Education Association as Amicus Curiae (p. 8, n. 9). In addition, the distinction was recognized by the court in *Lucia* v. *Duggan*, 303 F. Supp. 112 (D. Mass. 1969). In *Lucia*, the court refused to declare Mass. G. L., c. 71, ss. 42 and 42D, unconstitutional on equal protection grounds. 303 F. Supp. at 119, n. 5. On the other hand, the court held that the *actual method* of the plaintiff's dismissal violated due process. 303 F. Supp. at 118–119.

rests upon an adequate non-federal basis. This is made clear at the outset of the state court's opinion when it states as follows:

> "1. We are faced at the outset with a jurisdictional question not raised by the parties. No final decree was entered in the Superior Court. It is settled that an appeal from an order for decree has no standing. G. L. c. 214, s. 19. . . . [citations omitted] . . . Since no bill of exceptions was filed or allowed, the plaintiffs' exceptions are not open to review. G. L. c. 231, s. 113 . . . [citations omitted] . . . The issues, however, have been fully argued. There are presented questions of great importance both to the plaintiffs, who understandably desire a speedy determination of their status, and to the public. We therefore deem it advisable to express our opinion on the issues. [Citations omitted.]" Jur. St. App. 4a-5a.

The Supreme Judicial Court apparently believed that a resolution of the present case purely on procedural issues would be unwise (though not improper). The court made it quite clear, however, that there were *two* state bases upon which the trial court's decision might be affirmed — the absence of a final decree and the absence of a bill of exceptions. Both a final decree and a bill of exceptions are clearly and unequivocally required under the statutory provisions and case law cited by the state court.

II.

Mass. G. L., c. 71, ss. 42 and 42d, do not deny equal protection to non-tenured teachers.

Appellants' Jurisdictional Statement accurately sets forth the relevant provisions of Mass. G. L. c. 71, ss. 42 and 42D,[4]

[4] Appellants' Jurisdictional Statement also set forth Mass. G. L., c. 71, s. 41, but appellee fails to see the significance of this section with respect to the issues raised by appellants.

as they existed at the time of appellants' suspension and dismissal.[5] (Jur. St. 3–5). These sections confer certain procedural rights upon teachers "employed at discretion" (i.e., tenured teachers). These sections do not give the same rights to non-tenured teachers.[6] In view of appellants' due process and First Amendment contentions, however, it is important to point out that these sections do not *deny* any procedural rights to non-tenured teachers; rather the sections are merely silent with respect to the rights of such teachers. Thus, the equal protection issue before this Court is whether a state statute which gives certain procedural rights to tenured teachers prior to dismissal or suspension and is silent as to the procedural rights of non-tenured teachers denies equal protection to non-tenured teachers.

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[5] Since appellants' suspension and dismissal (and since the decision of the Supreme Judicial Court of Massachusetts), G. L., c. 71, s. 42, has been amended by St. 1970, c. 388, which provides as follows:

"SECTION 1. Section 42 of chapter 71 of the General Laws is hereby amended by inserting after the first sentence: — A teacher not employed at discretion under the preceding section and who has been teaching for more than ninety days shall not be dismissed for any reason unless at least fifteen days, exclusive of customary vacation periods, prior to the meetings at which the vote is to be taken, he shall have been notified of such intended vote and, if he so requests, he shall have been furnished by the committee with a written statement of the cause or causes for which the dismissal is proposed and if he so requests, he has been given a hearing before the school committee at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them, and the superintendent shall have given the committee his recommendations thereon.

"SECTION 2. Section 42 of chapter 71 of the General Laws, as amended by section one of this act, shall not apply to the renewal of a contract of a teacher not employed at discretion under the provisions of section forty-one of said chapter seventy-one." (*Approved June 4, 1970.*)

[6] See, e. g., the differences in the rights accorded to tenured and non-tenured teachers with respect to dismissal under G. L., c. 71, s. 42, as amended by St. 1970, c. 388. Footnote 5, *supra*. See also *Drown* v. *Portsmouth School District*, F. 2d (1st Cir., December 18, 1970).

Appellee submits that ss. 42 and 42D satisfy the tests of equal protection because, for purposes of suspension and dismissal, tenured and non-tenured teachers may be treated differently. This is not to say that non-tenured teachers have no constitutional procedural rights prior to suspension or dismissal. Rather, a state may accord certain rights to tenured teachers without according the same rights (though according different rights) to non-tenured teachers.

The propriety of distinguishing between tenured and non-tenured teachers is so well settled that it has been assumed in several of the cases relied upon by appellants and the amicus. E.g., *Drown* v. *Portsmouth School District*, F.2d (1st Cir., December 18, 1970); *Roth* v. *Board of Regents*, 310 F. Supp. 972 (W. D. Wisc. 1970); *Lucia* v. *Duggan*, 303 F. Supp. 112 (D. Mass. 1969). In *Drown*, Judge Coffin, in a thoughtful opinion, refers to a school board's "prerogative to be short-sighted and narrow-minded" with respect to the hiring of non-tenured teachers.[7] In *Roth*, the court stated that "it is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer". 310 F. Supp. at 978. In both *Drown* and *Roth* (and indeed in almost all the cases relied upon by appellants and the amicus) the issue before the court is not whether a distinction in procedural rights based on tenure denies equal protection but

[7] Judge Coffin describes the interests of a school board with respect to non-tenured teachers as follows:

> ". . . The school board is interested primarily in its ability to insure the quality of the school system by employing teachers for a probationary period. During this period, the board attempts to evaluate teaching ability to determine if the teacher merits tenure. Such evaluations require judgments about many subjective factors which are difficult to document with precision, such as the ability of the teacher to inspire students, his mastery of and progress in his subject, and his capacity to work effectively with colleagues, supervisors, and parents."

rather whether, under the particular facts of each case, a non-tenured teacher has been deprived of due process or of rights guaranteed by the First Amendment.

Lucia is the only case to discuss the equal protection issue. In that case, the court held that the plaintiff had been denied due process but rejected the plaintiff's equal protection argument in the following cursory footnote:

> "The court has considered and rejects plaintiff's further prayer that Mass. G. L. c. 71, ss. 42 and 42D be declared unconstitutional *per se* because they deny non-tenure teachers equal protection of the laws. 'There are valid reasons for treating the probationary teacher differently from the permanent teacher'. Developments in the Law — Academic Freedom, 81 Harv. L. R. 1045, 1092." 303 F. Supp. at 119, n. 5.

In summary, appellee submits that appellants' equal protection issue does not present a substantial federal question[8] and the decision of the Supreme Judicial Court should be affirmed on this issue.

III.

The manner of appellants' suspension and dismissal did not violate due process.

As already suggested, appellants' due process question is not appealable. However, appellee will discuss this issue as if it had been presented by a petition for writ of certiorari.

To begin with, appellee wishes to make it clear that it does not contend that appellants, as non-tenured teachers, have no right to due process.[9] Thus, appellee is in agreement with the main thrust of appellants' argument on the due process

[8] It is worth noting that a decision by this court on the equal protection issue would involve a decision with respect to a state law that has been substantially amended. See footnote 5, *supra*.

[9] To the extent that the Supreme Judicial Court of Massachusetts held to the contrary, appellee does not rely upon that holding.

question (Jur. St. 11–15). Appellee does submit, however, that it is apparent that, based upon the undisputed facts, appellants were not deprived of due process in this case. Accordingly, appellee will briefly set forth the relevant facts.[10]

On September 4, 1968, a demonstration took place at the Gibson School. On the next day, September 5, the demonstrators returned. Some of the demonstrators went behind the school to the yard where the children were being assembled for the start of classes, and announced that there would be no school that day at the Gibson School. Almost all the children were then led by the demonstrators to the Robert Gould Shaw House, a community center. The appellants, without informing, consulting with, or obtaining the consent of their superiors at the school, accompanied the demonstrators and the children to the Shaw House and conducted their classes there for the entire day.

Appellants returned to the Gibson School on the next morning, September 6, but were refused admittance. They were informed that they had been suspended for seven days by the Superintendent of Schools for unauthorized absence on September 5.[11] Appellants continued to teach at the Shaw House, where a considerable number of students from the Gibson School were still being taught.

On September 6, each appellant was notified by letter (Exhibit 5) of a hearing "on your suspension" to be held at 3:00 p.m. on September 11 at the School Committee Headquarters. No additional notice of the charges against appellants was ever given by the Committee to any of them. (Jur. St. App.

[10] Unless otherwise indicated, the succeeding statement of facts is derived from the opinion of the Supreme Judicial Court of Massachusetts. (Jur. St. App. 2a–4a.) It deviates from the court's opinion only in supplementing it with additional undisputed facts of record.

[11] Appellants have waived any claim that the initial seven-day suspension was unlawful.

18a.) Appellants were represented by counsel at the September 11 hearing. A verbatim transcript of that hearing was taken (Exhibit 1). At the September 11 hearing, counsel for appellants requested a continuance and a public hearing. At no time during the September 11 hearing did any counsel for appellants request a more specific notification of the charges against appellants (Exhibit 1). The Committee granted appellants' request for a continuance to September 25 but stated that the hearing on that date would be a closed hearing. The Committee further stated that the thirty-day suspension had been brought about by appellants' request for a continuance and was necessary to preserve the *status quo* pending the September 25 hearing (Exhibit 1, e.g., pp. 11–17, 25–26) and at least one counsel stated that he had expected that the suspension would be continued pending the actual hearing (Exhibit 1, p. 10).

The Committee also stated at the September 11 hearing that it was considering passing an order terminating appellants' contracts effective thirty days after delivery of notice. The Committee explained to appellants' counsel that it deemed such action to be necessary in order to insure the effectiveness of any order entered at the September 25 hearing. In other words, the thirty-day suspension would expire on October 11. Unless the Committee voted to terminate appellants' contracts on September 11, appellants (according to the Committee's understanding of the law) would be able to teach at the Gibson School from October 12 to October 25, even though the Committee might vote to terminate their contracts at the September 25 hearing. In order to prevent such an anomaly, the Committee voted to terminate the contracts on September 11 (Exhibit 1, pp. 24, 38). A waiver of the thirty-day notice was proposed by appellants' counsel (Exhibit 1, p. 29) and, in view of this offer, the termination vote was rescinded by

the Committee (Exhibit 1, pp. 33, 38). However, appellants' counsel later reneged on their prior agreement regarding the waiver of the thirty-day notice (Exhibit 1, pp. 39–42) and, as a result, the Committee, in order to prevent the aforementioned anomalous situation, voted to terminate appellants' contracts (Exhibit 1, p. 51). Finally, at the September 11 hearing, the Committee made it perfectly clear to appellants' counsel that its orders with respect to the thirty-day suspension and the termination of appellants' contracts would both be subject to review at the hearing scheduled for September 25 (Exhibit 1, pp. 7–8, 24, 26, 45–46, 52, 55).

Appellants do not clearly set forth their contention as to the manner in which they were denied due process. Apparently, they contend that they were suspended and dismissed without a prior hearing (Jur. St. 11). In the state court, they also contended that they had not received notice of the charges against them.[12] Although this argument is not raised in the Jurisdictional Statement, appellee will briefly discuss it.

With respect to notice, it is undisputed that on September 6 appellants "were informed that they had been suspended for seven days by the Superintendent of Schools for unauthorized absence on September 5" (Jur. St. 8–9). On the same day appellants were also notified that the School Committee would conduct a hearing on September 17 "on your suspension." The nature of the charges against appellants was so well known that appellants' counsel sought no explanation of the charges at the September 11 hearing. To contend that appellants did not know the nature of the charges against them would be disingenuous.

The main thrust of appellants' due process argument is that they were suspended and dismissed without a prior hearing.

[12] Appellants apparently no longer contend that they were entitled to a "public" hearing (Exhibit 1, pp. 17–22). There is no support for such a contention.

However, it is undisputed that they were offered a hearing on September 11, before the imposition of the thirty-day suspension and the notice of dismissal, and that a hearing was not held on that date because of appellants' request for a continuance. These facts alone strongly suggest that appellants have waived any right to a prior hearing. The reasonableness of the School Committee's action on September 11, however, can be justified on other grounds.

The situation facing the School Committee on September 11 was as follows. Appellants were charged with absenting themselves from school on September 5. As a result, they had been suspended for seven days. During this seven-day period appellants had continued to teach at the Shaw House, thereby encouraging "a considerable number of students" to absent themselves from the Gibson School (Jur. St. 9). It was by no means made clear to the Committee that appellants wished to return to the Gibson School even if they were reinstated (Exhibit 1, pp. 6-7, 16).[13] Furthermore, at least one counsel indicated that he had expected a continuation of the suspension pending a hearing (Exhibit 1, p. 10). Under these circumstances, appellee submits that the continuation of the suspension pending the hearing on September 25 was entirely reasonable and did not violate due process.

With respect to the Committee's decision on September 11 to notify appellants of their dismissal, appellee will not here reiterate the Committee's reasoning. However, appellee does wish to point out that appellants' dismissal was not to become

[13] No one of appellants' counsel objected to the following statement by Committeeman Tierney:

> It is my feeling by acceding to your request for a continuance you are forcing the Committee to continue the suspension and, also, in view of the fact that your clients have not indicated their readiness and willingness to come back to teach at the Gibson if this Committee so determines they would accept them back." (Exhibit 1, p. 16)

effective until October 11 and that the Committee's action with respect to the dismissal was subject to review and possible revision at the proposed hearing on September 25. Thus, it is inaccurate to state baldly that appellants were dismissed without a prior hearing. If there was no prior hearing, it was because appellants refused to appear.[14]

The question, so far as due process is concerned, is whether appellants can spurn a school committee's attempts to give them a hearing and then, after the committee has acted in the appellants' absence, claim that they were denied due process. The answer should be an emphatic: No.

Appellee submits that appellants' due process issue raises no substantial question for this Court's consideration.

IV.

Appellants' dismissal was not based upon the exercise of First Amendment rights.

Appellants contend that their dismissal "may" well have been based upon activities which are protected by the First Amendment guarantees of free expression. (Jur. St. 15–18.) This argument is based upon appellants' belief that absenting themselves from the Gibson School on September 5 was a constitutionally protected method of expressing their views in support of community control over the operations of the Gibson School. But this Court rejected such an argument in *United States* v. *O'Brien*, 391 U. S. 367, where it stated:

> "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct

[14] Appellee assumes throughout this argument that appellants, as non-tenured teachers, were entitled to a hearing prior to dismissal. But see *Drown* v. *Portsmouth School District*, *supra*.

> is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." At pp. 376–377.

The *O'Brien* test may be easily applied to the present case. Compelling the attendance of teachers is within the constitutional power of the government and is essential if the important governmental interest in educating children is to be accomplished. Individual teachers may think that schools would be more effective if they were run in a manner different from that which the School Committee and its executive officers decide. Perhaps such teachers are right, but suspending teachers because they do not appear in their classrooms but choose instead to induce children to spend the day elsewhere is not an unconstitutional suppression of free expression.

Whatever the merits of appellants' First Amendment claim, it has been decided by the Superior Court in the present case that appellants "were not in any way penalized by the Committee for such views [i.e., community control] or for their exercise of their constitutional rights of free speech and association." (Jur. St. App. 15a). Though appellants may contend that this decision was improper (but see *United States* v. *O'Brien*, *supra*) it would be anomalous to require the School Committee to reconsider its motivation after a court has decided that it was properly motivated. However, this is precisely what appellants seek (Jur. St. 18). The fact of the matter is that appellants have received judicial review of their First Amendment claim. Nothing more is required. Indeed, in *Drown* v. *Portsmouth School District*, F. 2d (1st Cir., December 18, 1970), the court held that a prior hearing was unnecessary to protect non-tenured teachers' First Amendment claims because such claims could always be raised in the courts.

Appellee submits that appellants' First Amendment issue does not present a substantial federal question.

Conclusion

Appellee submits that the following action should be taken on the present appeal:

(1) The appeal should be dismissed because it rests upon an adequate non-federal basis;

(2) Alternatively, the decision of the Supreme Judicial Court of Massachusetts should be affirmed;

(3) Alternatively and in the event that appellants' Jurisdictional Statement is treated as if it were a petition for writ of certiorari, certiorari should be denied.

Respectfully submitted,

Peter L. Kerr
Assistant Corporation Counsel
City of Boston Law Department
1 City Hall Square
Boston, Massachusetts 02201
(Tel. 617-722-4100)
Attorney for the Boston School Committee

Of Counsel:
Herbert P. Gleason,
Corporation Counsel
of the City of Boston

CITY OF BOSTON PRINTING SECTION